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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1467

ITT LAMP DIVISION OF THE INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Petitioner,

vs.

STEPHEN A. MINTER, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONSE TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

MATTHEW E. MURRAY,
R. THEODORE CLARK, JR.,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

I. THE DOCTRINE OF MOOTNESS IS NOT APPLICABLE TO THE PRESENT CASE.

Respondent argues that this Court should deny the Petition on the ground that since the strike against Petitioner is settled, the issue of whether a State can provide welfare assistance to strikers is moot. This contention was raised and rejected in the proceedings before the First Circuit.

The First Circuit held that the issue presented falls under "the 'recurring question' category, where significant public rights are involved and court review ought not, if possible be avoided." (Pet. Br. A, A2.)

This Court has also rejected the application of the mootness doctrine in cases where significant public rights are involved and the question is of a recurring nature. In *Southern Pacific Terminal Company* v. *ICC,* 219 U. S. 498 (1911), relied on by the First Circuit, the Appellant sought review of a short term order of the Interstate Commerce Commission which had expired pending review. The Commission, like Respondent, defended on the ground that the case had become moot. This Court held that the doctrine of mootness did not apply to cases where public rights and interests are involved and where the action complained of is of a recurring nature.

In *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), the Appellant challenged the validity of a statute whose provisions deprived the Appellant of an opportunity to run for elective office. Even though the election had taken place this Court refused to apply the doctrine of mootness since the issue was "capable of repetition, yet evading review." *Moore* v. *Ogilvie,* 394 U. S., *supra* at 816.

As in *Southern Pacific* and *Moore,* the issue in the instant case, as the First Circuit recognized, is one of a recurring nature and is inherently evasive of judicial review. The course of conduct which Petitioner seeks to enjoin continues to be implemented and therefore is no less an impediment to free collective bargaining at the present time than it was when this case was commenced. Rather than denying review of an issue involving "significant public rights" (Pet. Br. A, A2), the First Circuit recognized the continued importance of this question regardless of the fact that the strike against Petitioner was settled.

Further evidence that the doctrine of mootness is not applicable is found in the recent opinion of the Eighth Circuit in *Solien* v. *Teamsters Local 610, et al.*, ... F. 2d ..... (8th Cir. 1971), 76 LRRM 2780. In *Solien,* the Court was faced with the question of whether the party filing secondary boycott charges is entitled to the status of a party litigant in a temporary injunction proceeding in District Court. The Union contended that the case was moot since it had reached agreement with the trucking company with whom it had a dispute and also had ceased picketing the neutral employer. In rejecting the mootness argument, the Eighth Circuit, relying on this Court's decisions in *Southern Pacific* and *Moore,* and the First Circuit's opinion in the instant case, stated (2782-3):[1]

> "We are impressed with the argument of appellants that the alleged errors committed in the § 10(l) proceedings are inherently evasive of review since it is not feasible to perfect and obtain an appellate review prior to the Board's 'final adjudication.' Consequently, since we believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justifiable cases, the following comments are appropriate:
>
> > 'If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial

1. In a case almost identical to *Solien,* the Third Circuit held that the settlement of a strike and the cessation of picketing caused the issue to be moot. *Samoff* v. *IAM, District Lodge No. 1,* 420 F. 2d 952 (3rd Cir. 1969). The Eighth Circuit rejected the Third Circuit's application of the mootness doctrine in *Solien.*

> process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity.' 83 Harv. L. Rev. at 1692 (footnote omitted).
>
> "We conclude that these appeals are not moot: furthermore, the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness. *See ITT Lamp Division of the Int'l Telephone & Telegraph Corp.* v. *Minter*, ... F. 2d ..... (1st Cir. Nos. 7720 and 7749, Dec. 4, 1970).

If it were necessary for a strike to continue in order to secure review of the issue presented, it is likely that all cases would be moot by the time they reached this Court. In the instant case, the Petitioner acted in the most expeditious manner to secure judicial review and yet it would have had to endure almost an eight-month strike to avoid the Respondent's contention of mootness. Moreover, this Court has recognized that it "should be astute to avoid hindrances in the way of taking" cases which involve questions of State interference with federal labor policy. *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306-308 (1964).

Similarly, the argument of Respondent that this case is not presented in the context of meaningful litigation must be rejected. The decision of the District Court was taken after a full presentation by both parties and the Court's decision reflects its determination that the payment of welfare benefits does not conflict with the right of an employer to engage in free collective bargaining (App. A, A13). Likewise, the First Circuit rejected the argument that the payment of welfare benefits to strikers constituted an interference with the right to engage in free collective bargaining (App. A, A6-8). Both decisions fully considered and ruled on the issue now presented to this Court and it cannot be argued that the issue was not presented in the context of meaningful litigation.

II. THIS COURT SHOULD GRANT THE PETITION OF CERTIORARI SINCE THE ISSUE RAISED IS ONE OF PUBLIC IMPORTANCE INSOFAR AS THE ADMINISTRATION OF FEDERAL LABOR POLICY IS CONCERNED.

The importance of having this Court review the issue of whether the payment of welfare benefits to strikers conflicts with the established right of free collective bargaining is illustrated by the conflict generated among the states regarding the administration of federal and state welfare statutes toward strikers. The opinion of the First Circuit, upholding the position of the Massachusetts Attorney General, is in direct conflict with the position taken by the Attorney General of Iowa that welfare benefits should not be made available to strikers.[2] Thus, an employee on strike in Massachusetts would receive welfare while an employee on strike in Iowa would be denied these benefits even though the same employer might be involved. It is important that this Court resolve the question of whether strikers can, consistent with the right of free collective bargaining, receive welfare. To deny review will create further uncertainty in this area and hamper the administration of state and federal welfare statutes, as well as the implementation of the national labor policy of free collective bargaining.

The national importance of the question presented in this case is illustrated by the brief *amicus curiae* filed by the United States Chamber of Commerce. The Chamber of Commerce brief shows the pervasiveness of the problem of welfare assistance to strikers and the significant impact public assistance has had on collective bargaining throughout the country.

Recently this Court has held that the national labor

2. The Attorney General of Iowa has filed a brief *amicus curiae* in support of the Petition (A1-5).

policy should no longer emphasize "the protection of the nascent labor movement", but rather "the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes." *Boys Market, Inc.* v. *Retail Clerks Union, Local No. 770,* 398 U. S. 235, 257 (1970). But the payment of welfare assistance to strikers "rewards a man for walking off his job" and increases the "probability of a strike being long and its settlement costly."[3] In rewarding those striking, and in fact encouraging longer strikes, these welfare payments undermine the principal thrust of *Boys Market* which is to limit labor strife, rather than to promote it.

Welfare payments to strikers not only induces strikes, but, as has been shown, has the corollary impact of hindering free collective bargaining. Surely, in a system founded on these two notions, the promotion of both industrial peace and free collective bargaining, such payments have no place. *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45 (1937); Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 U. Pa. L. Rev. 467 (1964).

Lastly, Respondent overlooks the fact that the striking employees (which Respondent claims Petitioner is attempting "to starve" (Resp. Br. p. 6)) are individuals who voluntarily chose to refrain from working. This case does not concern individuals who were involuntarily unemployed. Conversely, this case concerns individuals who temporarily abandoned their jobs for the purpose of securing their Union's goals at the bargaining table and as this Court has recognized "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." *American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 309 (1965).

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3. Thiebolt and Cowin, *Food Stamps and Strikes: The Nature of the Problem,* Industrial Research Unit, University of Pennsylvania's Wharton School of Finance and Commerce (February, 1971).

CONCLUSION.

For the reasons set forth in the Petition and in this Brief in Response, Petitioner submits that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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April, 1971.